No. 3965

In the

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM REID and WILBUR P. REID, Partners doing business under the firm name and style of National Cold Storage & Ice Company

Plaintiffs in Error

vs.

H. A. BAKER

Defendant in Error

Upon Writ of Error to the United States District Court for the District of Oregon

Brief of Defendant in Error

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STATEMENT OF THE CASE.

This was an action by Baker against the Reids doing business as National Cold Storage and Ice Company, who will be referred to as the Cold Storage Company, for the loss of 398 barrels of loganberries weighing 170,156 pounds.

During the months of July and August, 1920, Baker purchased from growers and packed at

Salem, Oregon, approximately 1,600 barrels of loganberries. (Record, p. 404.) The packing of berries consists in placing them in fifty-gallon barrels and then sealing on tops. The barrels in question were conveyed by covered trucks from Salem, Oregon, to Portland, Oregon, a distance of approximately fifty miles, where they were delivered to the Cold Storage Company for freezing and safe keeping. It was the practice to deliver the barrels to the Cold Storage Company at Portland on the next day after the berries were picked from the fields.

The complaint recited the storage of 398 barrels of loganberries with the Cold Storage Company during the months of July and August, 1920; that the loganberries when delivered were in good condition, that they were delivered and accepted by the Cold Storage Company to be kept in a proper state of refrigeration so that they would not ferment or deteriorate in value, but that the Cold Storage Company permitted the temperature in the rooms where the berries were stored to go above freezing—32 degrees—resulting in fermentation of the berries and their loss, and judgment at the rate of 17½ cents per pound, or a total of $29,777.30, was prayed.

The Cold Storage Company by its answer admitted the receipt of the berries and their weight but asserted that the berries were in bad condition when delivered to it, notwithstanding which the

barrels were accepted and kept and at the time of the trial were in as good condition as when delivered except for natural decay. The answer also asserted that during the years 1920 and 1921, Baker stored with the Cold Storage Company "various and sundry barrels of loganberries including the 398 barrels mentioned in the complaint herein for which storage the plaintiff promised to pay the defendants at the rate of $1.15 per barrel for the first month and 65 cents per barrel per month thereafter", (Record, p. 12), and a total claim of $5,811.34 was set up against Baker.

The trial resulted in a verdict and judgment for Baker for $23,000.

The testimony as to the condition of the berries when picked covered all of the barrels because there was no way to identify the 398 barrels from the others; likewise all of the barrels were picked at Salem and were hauled to Portland and delivered to the Cold Storage Company under identical conditions. Delivery to the Cold Storage Company extended through the months of July and August. As the season advanced Baker from time to time gave orders to the Cold Storage Company to load a given number of barrels on refrigerator cars, and these would be shipped East. Shipments began about the last of July.

In the early part of August, Baker discovered that the temperature in the cold storage room in-

stead of remaining around 20 to 24 degrees had been permitted to go above freezing, resulting in the bulging and bursting of barrel heads. A considerable number of barrels had been shipped before this was discovered. Shipments were stopped and after the barrels were cleaned up, further shipments were made, Baker not appreciating the extent of the loss. The barrels thus shipped had been sold to eastern purchasers f. o. b. cold storage plant, Portland, Oregon, and it was to protect prior sales that many of these were made. It finally became evident to Baker that the rise in temperature in the cold storage plant had been for a much longer period than he had supposed and he became convinced that all the berries which were subjected to this rise in temperature, had fermented and were worthless. By this time there were only 398 barrels left in the Cold Storage Company plant and this action was brought to recover for the loss of these berries which remained.

In the course of the trial and in order to show what had happened as to the temperature, and the effect on the berries in question due to a rise in temperature, as well as efforts to dispose of these barrels, Baker was asked as to some of the barrels that went East. The answers objected to were as follows:

> "The car that was shipped to Chicago to one of our buyers about the fourth of August arrived there with about twenty-nine barrels in

bad order; it was so reported. Another car that was shipped, I think about four or five days later than that, arrived there with about between fifty and sixty per cent; I understand there was about one hundred barrels to a car, ran from ninety-nine to one hundred and five, and the second there was about fifty to sixty per cent that arrived in bad condition. The third car, which went out a few days later than that, probably three or four days, perhaps only two or three days, that time, arrived all in bad condition and all that were shipped arrived after that—between that time and when I stopped them, when I found out the actual condition—arrived in bad order excepting those two cars I have just mentioned, when a portion of that was saved, showing the progress of the fermentation." (Record, p. 169.)

"Why, most of them arrived in bad condition excepting those I have just mentioned, the two cars." (Record, p. 171.)

Of the assignments of error the only one pressed before the court has to do with these answers.

ARGUMENT.

The cases found in the brief of plaintiffs in error are statements of general law concerning which there can be little dispute. We think it will be conceded that an appellate court will not presume error or prejudice; on the contrary we understand the rule to be that to justify reversal testimony objected to as immaterial or irrelevant must be shown to be such and if it is immaterial or irrelevant it must

appear from the case that prejudice has resulted. As said by the court in *Miller vs. Continental Shipbuilding Corporation,* 265 Fed. 158 (C. C. A. 2d):

> "To justify a reversal because of the admission of immaterial evidence, it should appear that the error was so substantial as to injuriously affect the rights of the plaintiff in error as prejudice will not be presumed."

Furthermore, the general language of the court in *Lancaster vs. Collins,* 115 U. S. 222, at 227, is:

> "No judgment should be reversed in a court of error when it is clear that error could not have prejudiced and did not prejudice the rights of the party against whom the ruling was made."

I.

The Evidence Objected to was Relevant and Material.

(a) The amended complaint alleged and the answer denied "that the temperature in the room or rooms where said loganberries were stored was permitted by defendants to go above freezing point" (Record, pp. 6, 10), and it was also asserted and denied that the loganberries were not kept in the proper state of refrigeration. It was incumbent upon Baker to prove that the temperature did go to freezing or above and for how long it remained there. Baker was in the cold storage plant on July 31 and all of the barrels seemed to be in good condition. (Record, p. 162.) He began to ship out

about this time. (Record, p. 163.) About August 16 he learned that the temperature of the room had gone up to 36. (Record, p. 165). At this stage of the case, when the testimony objected to was given, Baker was trying to show about when the rise in temperature began and how long it lasted. Therefore, he explained (Record, p. 170), that prior to August 1, two cars were shipped without any difficulty. As to the cars which were in the cold storage plant on August 1 and were shipped on or after that date, most of them arrived in bad condition. (Record, p. 171.) Clearly this evidence threw some light on the question of what was going on in the cold storage plant and as later developed from the testimony of the chief engineer of the Cold Storage Company, the temperature did start up on August 1 (Record, p. 452), and continued up until August 21 (Record, p. 455). At the outset, however, Baker was confronted with a denial that the temperature had gone up to or above freezing and there was no indication that the Cold Storage Company had or would produce such a record as it did offer at the conclusion of the trial. The testimony objected to showed that two cars—about 200 barrels—shipped out before August 1 went East without trouble and that barrels shipped out after August 1 were for the most part in bad condition. These circumstances tended to show the temperature began to rise August 1.

(b) The evidence objected to was material as showing the effect of a rise of temperature on the berries. It must be remembered that except for the two hundred barrels which were shipped out before August 1, all of the barrels including the 398 barrels here involved, were picked in the fields, packed in the barrels, transported to the cold storage plant, and subjected to the same rise in temperature which began on August 1. It was claimed by the Cold Storage Company that the rise in temperature did not cause fermentation, and furthermore, that fermentation would not injure the loganberries. It is manifest that the condition of other barrels, as to fermentation, handled in precisely the same manner as the 398 barrels, would have some value in showing the condition of the 398 barrels. The testimony therefore showed that as to the two carloads which went East prior to August 1, they arrived in good condition, but

> "The car that was shipped to Chicago to one of our buyers about the fourth of August arrived there with about twenty-nine barrels in bad order; it was so reported. Another car that was shipped, I think about four or five days later than that, arrived there with about fifty and sixty per cent; I understand there was about one hundred barrels to a car, ran from ninety-nine to one hundred and five, and the second there was about fifty or sixty per cent that arrived in bad condition. The third car, which went out a few days later than that, probably three or four days, perhaps only two or three days, that time, arrived all in bad con-

> dition and those that were shipped arrived after that—between that time and when I stopped them, when I found out the actual condition—arrived in bad order excepting those two cars I have just mentioned, when a portion of that was saved, showing the progress of the fermentation." (Record, p. 169.)

(c) Throughout the case it was claimed by the Cold Storage Company that Baker had failed to make efforts to dispose of the 398 barrels and that he was in duty bound to take possession of these barrels and dispose of them. Baker claimed to have taken every reasonable step that was possible to dispose of the 398 barrels. The testimony objected to was directly in point showing efforts to dispose of a large number of other barrels which had been handled in the same manner as the 398 barrels. It was shown that Baker had already sold on future contracts a large quantity of these barrels and shipments from this lot to apply on those contracts met with failure and a shipment by Baker of 100 barrels to himself at Chicago arrived in bad order and could not be sold. (Record, pp. 194, 212, 213.)

As explained by Baker (Record, p. 183):

> "We could not, very well, Mr. Boothe, because they had been thoroughly fermented out at that time. You don't know what shape they were in. As I told you before in my testimony, we shipped out in August car after car and they arrived back in Chicago in bad order, we could not go any faster than we did and had to stop."

(d) The testimony was material on the question of storage charges. The Cold Storage Company by its answer asserted a claim of $5,811.34 as storage charges covering the storing and handling of "various and sundry barrels of loganberries including the 398 barrels mentioned in the complaint herein." If the Cold Storage Company failed to perform its duty in handling all or any part of these berries for which the storage charges were claimed, then it was not entitled to recover such charges, at least charges after August 1. Testimony therefore showing the bad condition of barrels shipped on or after August 1 was important in determining whether any charges had been earned after that date.

Complaint is made in the brief of plaintiffs in error that the testimony objected to was incompetent because Baker was on the Pacific Coast when the various shipments arrived in the East. At the outset it should be noted that no objection was made to the testimony on the ground that it was incompetent or that Baker did not have personal knowledge of the matters concerning which he spoke. Furthermore, there was no attempt to cross examine Baker and develop any lack of knowledge if that was true. It only required three days to go to and from Chicago and he was doubtless there some of the time. It is obvious that Baker was the most likely man to be familiar with his own business and unless some objection as to his competency

was made or some proof to the contrary were offered, the testimony should stand.

The objection, in the record, to this testimony, seems to be predicated upon the theory that it is too remote because, to quote the language of counsel for plaintiffs in error, "those goods were shipped a long ways in refrigerator cars." (Record, p. 170.) It was shown, however, that the shipment of barreled loganberries by refrigerator cars to eastern points, is a common method of doing business. Baker had shipped thousands of barrels in his experience. (Record, p. 171.) He said: "I have never lost a barrel in shipping by refrigeration. We have had some loss but not loganberries, where there was lack of ice, but those are very exceptional." Furthermore, it was brought out by counsel for the Cold Storage Company in the cross examination of Baker that certain actions had been instituted by some of the purchasers of these berries against railroad companies, but after investigation they had found that the railroad companies were not at fault and the claim "was either against the Cold Storage Company or myself." (Record, p. 215.) This was testimony offered by counsel for the Cold Storage Company. It is submitted, therefore, that the position of the District Judge as to this evidence was correct when he said, "I think it is a circumstance, whatever the jury think it is worth, of course."

But it is said that evidence of other barrels of the same lot arriving in bad condition, was prejudicial to the Cold Storage Company and would inflame the mind of the jury. It will be observed from the record that counsel for Baker said, "We are not claiming any damages for those that went East" (Record, p. 169), and this was thoroughly understood by the court, jury and counsel for the other side. Furthermore, it was clearly shown that a large part of the barrels that were shipped East had been sold f. o. b. cold storage plant, Portland, Oregon (Record, pp. 179, 207), and the loss did not fall on Baker. Furthermore, the total claim for the 398 barrels at the rate of 17½ cents per pound was $29,777.30. There was ample testimony showing the market value of 17½ cents as a measure of loss. The jury allowed $23,000. There is not the slightest indication of any passion, or prejudice, or inflamed state of mind on the part of the jury, or that it undertook to allow damages for some other barrels.

It should be noted that the counsel for the Cold Storage Company repeatedly brought before the attention of the jury the same line of testimony as here objected to. In the cross examination of Baker (Record, p. 193), counsel asked:

> "What did you want to sell them for? A. I was going to sell them for what they were worth. We didn't sell them, we sent them back to Chicago. Those are not sold. We sent them

> back to Chicago to see what we could do with them. We soon found out we could not do anything with them."

Furthermore, in the cross examination of Baker counsel for the Cold Storage Company had him identify defendants' exhibit "F" (Record, p. 208), which was offered and introduced. That exhibit in part states:

> "It is rather unfortunate that you shipped any loganberries at a time when the temperature was running from 33 to 36; that is what is now causing trouble in the East as indicated by the car shipped to Durant and Casper."

It should also be pointed out that the depositions of Matthew H. Theis and Peter J. Slaughter were taken on behalf of Baker prior to the trial and read in evidence. The testimony of Theis (Record, pp. 248, 254), refers to the condition of barrels shipped to Chicago concerning which no objection was made. Furthermore, counsel for the Cold Storage Company cross examined this witness without objecting to his direct testimony and brought out on such cross examination the very facts upon which error has been predicated. (Record, p. 266). The same may be said of the testimony of Peter J. Slaughter (Record, pp. 276, 282), and his cross examination by counsel for Cold Storage Company (Record, p. 286.) See generally on the relevancy and materiality of such evidence and the discretion of the trial court, I Wigmore on Evidence, Sections 441-444.

II.

The Admission of the Testimony Complained of Was Not Prejudicial Error.

It is difficult to see where prejudicial error could have resulted to the Cold Storage Company. In fact, the objection was faintly made at the time (Record, pp. 168, 170). No ground for the objection was assigned except that the barrels had nothing to do with the barrels in question and that they were shipped a long ways in refrigerator cars. That they did have to do with the barrels in question is shown by the fact they were picked, handled, stored and subjected to the same temperature as the barrels in question, the former having moved out in refrigerator cars and the latter remaining where they were, but the handling of loganberries in refrigerator cars was shown to be as safe and common as to leave them in a cold storage plant. The evidence did, therefore, have something to do with the question of what had happened to the 398 barrels and their condition. It is significant that counsel for the Cold Storage Company after faintly objecting to this evidence, cross examined at considerable length on the question of barrels that had gone East. Furthermore, as indicated above, no objection was made to the testimony given by witnesses Theis and Slaughter as to some of these barrels and their condition, and it is apparent that counsel ought not to claim error where the record

shows that most of the interrogating as to the shipped barrels was on the part of counsel himself.

At the end of the case the court instructed the jury as to the 398 barrels, so that there could be no mistake as to what was the subject under investigation (Record, p. 492). There was no request by counsel for the Cold Storage Company that any instruction be given to clear the minds of the jury, or that it had been misled, and there were no exceptions to the instructions as given by the court.

Furthermore, if by any possibility it could be said that the evidence in question was error which had not been waived, then it seems clear that the case was proved without this evidence and therefore the admission of the evidence was harmless.

This court announced the rule in *Sharples Separator Company vs. Skinner,* 251 Fed. 25 (C. C. A. 9th), quoting from the head note, as follows:

> "The admission of testimony is harmless, if erroneous, where the fact elicited was established by other competent evidence."

The same rule was stated in *Keith Lumber Company vs. Houston Oil Company,* 257 Fed. 1 (C. C. A. 5th), reading from the head note, as follows:

> "The erroneous introduction in evidence of a decree was harmless, where there was ample evidence outside of the record to show the fact of title for which the decree was used."

See also to the same point, *South Memphis Land Company vs. McLane Hardwood Lumber Company,* 210 Fed. 257 (C. C. A. 6th).

In this case the fact that the temperature was permitted to go to and above freezing which was denied in the answer was later proven by the witnesses for the Cold Storage Company. Furthermore, the length of time during which the temperature remained at freezing or above was shown. It was demonstrated by other testimony that to remove the temperature from the 398 barrels was to destroy their food value and their value at 17½ cents per pound was established. It was proved that the Cold Storage Company took its freezer machine from the cold storage room to make ice on another contract. All of this testimony developed as the case progressed and the right of Baker to be compensated for the 398 barrels on account of the fault of the Cold Storage Company, was demonstrated to the satisfaction of the jury. The case was fairly tried as will be seen from an examination of the entire record which has been brought up, and is particularly evidenced by the fact that there were few objections and there is but one assignment of error argued here.

The argument of counsel for Cold Storage Company when fairly analyzed amounts to an objection that the jury should have awarded a different verdict, whereas a reading of the record will furnish

proof that the verdict was justified under every consideration; at any rate, fact issues were presented to the jury and fairly decided. Under these circumstances the language of Mr. Justice Shiras in *Holmes vs. Goldsmith,* 147 U. S. 150, 13 S. C. R. 288 at 292, is applicable. He said:

> "The modern tendency, both of legislation and of the decision of courts, is to give as wide a scope as possible to the investigation of facts. Courts of error are especially unwilling to reverse cases because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused."

It is submitted that the testimony complained of was relevant, but if not, it in no way constituted prejudicial error justifying the reversal of this case.

Respectfully submitted,

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